Appendix A

In the Court of Appeal
State of California
First Appellate District

DIVISION ONE

Malcolm E. Harris, Director of the Department of Alcoholic Beverage Control of the State of California, Petitioner and Appellant, vs. Alcoholic Beverage Control Appeals Board of the State of California; Charles Cohon and Irving Sirbu, Respondents.	1 Civil 22,905
James O. Reimel, Director of the Department of Alcoholic Beverage Control of the State of California, Petitioner and Appellant, vs. Alcoholic Beverage Control Appeals Board of the State of California; Jack Dorian and Walter Matoff, Respondents.	1 Civil 22,906
James O. Reimel, Director of the Department of Alcoholic Beverage Control of the State of California, Petitioner and Appellant, vs. Alcoholic Beverage Control Appeals Board of the State of California; Catherine Carella and Michael Carella, Respondents.	1 Civil 22,994

James O. Reimel, Director of the Department of Alcoholic Beverage Control of the State of California, Petitioner and Appellant, vs. Alcoholic Beverage Control Appeals Board of the State of California; Michael A. Carella and Pasquale Maniscalco, Respondents.	1 Civil 22,995
James O. Reimel, Director of the Department of Alcoholic Beverage Control of the State of California, Petitioner and Appellant, vs. Alcoholic Beverage Control Appeals Board of the State of California; Charles Cohon and Irving Sirbu, Respondents.	1 Civil 23,282
James O. Reimel, Director of the Department of Alcoholic Beverage Control of the State of California, Petitioner and Appellant, vs. Alcoholic Beverage Control Appeals Board of the State of California; Fred Lancelotti and Henry J. Lancelotti, Respondents.	1 Civil 23,401

OPINION

These consolidated appeals primarily concern the interpretation of Business and Professions Code[1] sec-

[1]All statutory references unless otherwise noted are to Business and Professions Code.

tion 24755 as amended in 1961 which relates to minimum retail price schedules for branded distilled spir mum retail price schedules for branded distilled spirits. The section is part of the Alcoholic Beverage Control Act (§§ 23000-25762) which herein will be called the Act.

The individual respondents and real parties in interest were holders of off-sale general liquor licenses issued by the Department of Alcoholic Beverage Control (hereinafter called Department). Against each respondent licensee the Department filed an accusation alleging the sale of branded distilled spirits at prices less than the stipulated minimum retail schedules duly filed with the Department. After hearings the Department found the charges to be true. As to some of respondent licensees, license suspension was ordered; as to the others the sanction was license revocation.

Appeals in each case were taken to the Alcoholic Beverage Control Appeals Board (hereinafter called Appeals Board). The Appeals Board reversed the several decisions of the Department. It held in each case that the record did not establish publication as required by section 24755; therefore the evidence did not support the Department's findings that the licensees sold at prices "below the minimum retail price schedule duly filed."

The Department thereupon filed in the superior court applications for mandate (Code Civ. Proc., § 1094.5) seeking reversal of the decisions of the Ap-

peals Board. The superior court, after hearings, entered judgment in each case denying the prayed for relief. Each of the judgments recited: "The foregoing judgment is rendered by this Court upon the grounds that, as determined by the Appeals Board in its decision, the record does not contain substantial evidence that the petitioner sustained its burden of proving publication of the price schedule in the manner required by section 24755 of the Business and Professions Code."

It is from these judgments that the instant appeals were taken.

As pertinent here section 24755 provides:

"(a) No package of distilled spirits which bears the brand, trademark or name of the owner or person in control shall be sold at retail in this State for consumption off the license premises unless a minimum retail price for such package first shall have been filed with the department in accordance with the provisions of this section.

"(b) A price for each of such packages shall be in a minimum retail price schedule setting forth with respect to each package the exact brand, trademark or name, capacity, and type of package, type of distilled spirits, age and proof, where stated on the label, and the minimum selling price at retail. . . . *Any person filing such schedule shall cause such schedule to be published in a manner which will result in each retailer affected by such schedule being advised of the contents of such schedule prior to the effective date thereof.*

(c) Such schedule shall be filed by (1) the owner of the brand [or any of certain other designated persons]. . . .

(e) No offsale licensee shall sell any package of distilled spirits at any price less than the effective filed price of such package. . . ."[2] (Emphasis added.)

Under the authority of section 24757[3] the Department adopted its rule 99 (k) (tit. IV, Cal. Adm. Code) which as pertinent here states: "(k) Publication. The person filing minimum retail price schedules shall cause prices for all items on every original price schedule and for every change of price or new price on every replacement price schedule *to be published in a trade journal of general circulation in the trading areas affected on or before the effective date thereof.* . . ." (Emphasis added.)

It seems proper at this point before discussing the respective contentions of the parties to consider certain fundamental principles relating to the enforcement of the Act.

Our Supreme Court in Allied Properties v. Department of Alcoholic Beverage Control, 53 Cal.2d 141, 147, has said, "A state has particularly wide powers with respect to the . . . traffic in alcoholic beverages and may provide for their prohibition or im-

[2] Section 24755 also delineates "trading area" for which the minimum retail price schedules may be filed separately and differently. Here we are concerned with the northern California trading area. Effective November 8, 1967, section 24755 was again amended. Among the changes the requirement of publication was deleted.

[3] "The [D]epartment may adopt such rules as it determines to be necessary for the administration of sections 24754 to 24756 inclusive. . . ." (Bus. & Prof. Code, § 24757.)

pose such conditions and regulations as it may deem proper."

This court in State Bd. of Equalization v. Superior Court, 5 Cal.App.2d 374, 377, stated: "Unlike the rule with respect to the right to deal in ordinary commodities . . . there is no inherent right in a citizen to sell intoxicants [citations]; and a license to do so is not a proprietary right within the meaning of the due process clause of the Constitution ([Cal.] Const., art. I, § 13), nor is it a contract [citation]; it is but a permit to do what would otherwise be unlawful, . . ." (See also Kirchhubel v. Munro, 149 Cal.App.2d 243, 247-248; Schaub's Inc. v. Dept. of Alcoholic Beverage Control, 153 Cal.App.2d 858, 869-870.)

Section 24755 does not require as an element of its violation that a sale below the effective minimum retail price schedule be made *knowingly*. A strict liability is imposed on those exercising the privilege of selling alcoholic beverages. (See DeMartini v. Department of Alcoholic Beverage Control, 215 Cal.App. 2d 787, 815; Morell v. Department of Alcoholic Beverage Control, 204 Cal.App.2d 504, 513; Munro v. Alcoholic Beverage Control Appeals Board, 154 Cal. App.2d 326, 329; Mercurio v. Department of Alcoholic Beverage Control, 144 Cal.App.2d 626, 630-631.)

The duty to enforce and administer the Act is vested in the Department, and "it has been given a broad range of power and discretion in carrying out this duty." (Harris v. Alcoholic Beverage Control Appeals Board, 238 Cal.App.2d 24, 30.)

We shall state the several contentions on these appeals as they are outlined by respondents.

The first and principal contention of respondents[4] may be stated as: *The record discloses that the Department did not sustain its burden of proving publication of the minimum retail price schedule as required by section 24755.*

The specific contention of respondents takes the following form. In order that section 24755 be violated there must be a sale below the "effective" filed minimum retail price schedule (§ 24755(e)). For such a schedule to be "effective" there must have been a compliance with paragraph (b) of the section which provides that the "person filing such schedule shall cause [it] to be published in a manner which will result in each retailer affected by such schedule being advised of [its] contents." The schedule was not so published; it follows that there was no "effective" price schedule and accordingly no violation.

Further it is contended: The specification that the schedules be published in a manner which will result in each retailer being advised of their contents is a requirement of some form of actual notice by personal service or by mail.

The records of the administrative hearings show the following: Publication of the minimum retail price schedule was made in the Beverage Industry News, a privately owned monthly publication in business since 1946. It was a trade journal of the liquor

[4]This is the only contention urged by respondent Appeals Board.

industry in general circulation in the area here concerned. Its subscription price was $7.50 per year. Since 1946, copies of the publication had been mailed monthly to a majority of the off-sale retail licensees authorized to sell alcoholic beverages in the northern California trading area.

It is clear that publication here was not made in a manner designed to effect actual notice by personal service on, or mailing to, each retailer affected.

In cases dealing with a statutory requirement of publication in a newspaper, California's appellate courts have defined publish as to "disclose, reveal, proclaim, circulate or make public" (Application of Monrovia Evening Post, 199 Cal. 263, 266; Western States Newspapers, Inc. v. Gehringer, 203 Cal.App. 2d 793, 795) and "'to proclaim, to advertise.'" (Arthur v. City of Petaluma, 27 Cal.App. 782, 788.)[5]

Black's Law Dictionary (4th ed. 1954) defines "publish" as "To make public; to circulate; to make known to people in general. . . . An advising of the public or making known of something to the public for a purpose." It defines "publication" as "To make public; to make known to people in general; . . . The act of publishing anything; offering it to public notice, or rendering it accessible to public scrutiny." Webster's New International Dictionary, Unabridged (2d ed. 1953), defines "publish" as "To make public announcement of; to make known to people in general; . . . To

[5]We consider "publish" and "publication" in the sense of transmitting information or knowledge. They have, of course, other connotations such as in the law of defamation, negotiable instruments, wills, etc.

promulgate or proclaim, as a law or an edict. . . . To make public in a newspaper, book, circular or the like." (See also 73 C.J.S. 1250-1251.)

"Publish" has been held not to be synonymous with "communicate" or "to divulge" or "to make known." (United States v. Baltimore Post Co., 2 F.2d 761, 764; 15A C.J.S. 84; 51 C.J.S. 463.) Inseparable from the term is the idea of publicity and circulation. (United States v. Williams, 3 F. 484, 486; People v. Burns, 166 N.Y.S. 323, 325; Cox v. First Mortgage Loan Co., 173 Okla. 392, 394 [48 P.2d 1060, 1063.]) "The thought running through all the uses of the words . . . is an advising of the public or the making known of something to the public for a purpose. . . ." (Estill County v. Noland (Ky.) 175 S.W. 2d 341, 346; Marx v. United States, 96 F.2d 204, 206; Associated Press v. International News Service, 245 F. 244, 251.)

We have before us conflicting statutory provisions. If we accept respondents' interpretation we must ignore the phrase, "shall cause such schedule to be published." Conversely, if we give "published" its ordinary and accepted meaning we must hold that actual notice to each licensee is not required.

If reasonably possible, conflicting provisions of a statute should be reconciled and brought into harmony with each other (Hough v. McCarthy, 54 Cal.2d 273, 279; County of Placer v. Aetna Cas. etc. Co., 50 Cal. 2d 182, 188-189.) In doing so, effect and meaning should be given to each word and phrase under consideration. (Select Base Materials v. Board of Equal., 51 Cal.2d 640, 645; Brown v. Cranston, 214 Cal.App.

2d 660, 672.) A construction should be avoided which implies that the Legislature was ignorant of the meaning of language employed, or that it used words in vain, the legal intendment being that each and every clause was inserted for some useful and reasonable purpose. (Prager v. Isreal, 15 Cal.2d 89, 93; Siler v. Industrial Acc. Com., 150 Cal.App.2d 157, 161.) The use of a word with settled legal meaning is some indication that such meaning was intended. (Perry v. Jordan, 34 Cal.2d 87, 93; City of Long Beach v. Payne, 3 Cal.2d 184, 191.)

In its interpretation of section 24755 the Department has given to the word "published" its accepted meaning. It has concluded that the intent of the Legislature was that the price schedules be published in a manner *most likely* to give notice to the affected licensees. (Rule 99(k) requiring publication "in a trade journal of general circulation" gives rational effect to this interpretation. Such a publication may reasonably be considered as most likely to give the desired notice

We are required to accord great respect to this interpretation by the Department. It must be followed unless it appears to be clearly erroneous. (Cohon v. Department of Alcoholic Beverage Control, 218 Cal. App.2d 332, 339; see also Adoption of Parker, 31 Cal. 2d 608, 615; Bodinson Mfg. Co. v. California Employment Com., 17 Cal.2d 321, 325-326; Neely v. California State Personnel Bd., 237 Cal.App.2d 487, 491; Rich v. State Board of Optometry, 235 Cal.App.2d 591, 604.) Accordingly, we now direct our inquiry

into the reasonableness of the Department's interpretation.

The search for the Legislature's intent is aided by a consideration of section 24875 of the Act relating to minimum price schedules for wine. That section provides for publishing (by the person filing the schedules) in *a trade journal of general circulation* among affected licensees. It then recites: *"Instead of publishing* [*such person*] *may mail his price schedule or any changes therein to licensees affected."* (Emphasis added.) An intent to give the word "publishing" a meaning other than the giving of actual notice as insisted by respondents, is demonstrated. Elsewhere in the Act where actual notice is intended, appropriate words are used, i.e., sections 23328, 23329, 23987, prescribing "written notice," and section 25760 calling for notice "personally or by mail." "[I]t is a well-established rule of construction that when a word or phrase has been given a particular scope or meaning in one part or portion of a law it shall be given the same scope and meaning in other parts or portions of the law." (Stillwell v. State Bar, 29 Cal. 2d 119, 123.)

Throughout the statutes and codes of this state the Legislature has many times provided for publication of notices. So far as we can determine the term has never been construed to require actual notice. In construing a provision of any code, reference may properly be made to other codes or statutes for clarification. (In re Porterfield, 28 Cal.2d 91, 100; People v. Vassar, 207 Cal.App.2d 318, 323.) "When

the scope and meaning of words or phrases in a statute have been repeatedly interpreted by the courts, there is some indication that the use of them in a subsequent statute in a similar setting carries with it a like construction." (Perry v. Jordan, supra, 34 Cal. 2d 87, 93.)

It seems reasonable to conclude that the Legislature intended in its amended section 24755 the common and accepted meaning of the word "published."

However, the Department was required, as are we on these appeals, to give meaning, if possible, to the words *"in a manner which will result in each retailer . . . being advised of* [*its*] *contents."* If necessary, in order to reach such a result, we can depart from a literal construction of the words employed. (County of Los Angeles v. Frisbie, 19 Cal.2d 634, 639; In re Kernan, 242 Cal.App.2d 488, 491; Brown v. Cranston, supra, 214 Cal.App.2d 660, 672-673. "[T]he intention of the Legislature must be ascertained, if possible, and, when once ascertained will be given effect, even though it may not be consistent with the strict letter of the statute." (Struckman v. Board of Trustees, 38 Cal.App.2d 373, 376.)

We conclude that the Department's determination that the words in question, in the context of the Act and its section 24755, indicated a legislative intent that the price schedules be published in a manner *most likely* to give notice to the affected licensees is reasonable and correct. This interpretation gives effect to each of the words and phrases under consideration. It brings them to a degree of harmony with

each other not otherwise possible. And it is consistent with the usual meaning given the word "published" by the Legislature and by the courts.

The Department's interpretation is in accord with the general legislative practice of prescribing publication in such a manner as is best designed to give notice to persons concerned.[6] And it imposes no hardship upon the individual licensee who is under an affirmative duty to conduct his business in accordance with law. (See Morell v. Department of Alcoholic Beverage Control, supra, 204 Cal.App.2d 504, 514; Munro v. Alcoholic Beverage Control Appeals Bd., 181 Cal.App.2d 162, 164; Cooper v. State Board of Equalization, 137 Cal.App.2d 672, 678.) If he cannot conveniently check the price schedules filed with the Department he may have the information delivered to him by subscribing to the Beverage Industry News.

Respondents urge that such a construction of section 24755 makes it "incumbent on a retailer to assume the burden of subscribing to a private trade journal which has no official blessing, sponsorship or information at its disposal."

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[6]I.e., Code of Civil Procedure section 1277, in a "newspaper of general circulation . . . printed in the county"; Health and Safety Code section 4785, in a "newspaper having a general circulation in the [sewer] district"; Labor Code section 1181, "by advertisement in at least one newspaper published in each of the cities of Los Angeles, Oakland, Sacramento, San Jose, Fresno, Eureka, San Diego, Long Beach, Alameda, Berkeley, Stockton, San Bernardino, and San Francisco"; Business and Professions Code section 23986, "in a newspaper of general circulation in the city in which the premises are situated"; Revenue and Taxation Code section 3391, publication "within the county as they [the board of supervisors] shall determine most likely to afford adequate notice to owners whose property is upon the delinquent lists."

The Act simply provides that the retailer shall not sell at prices below the effective minimum price schedules under peril of administrative sanction. The publication provisions of section 24755 and rule 99(k) make these price schedules readily available to him. He may, however, obtain the retail price information from the Department where it is on file or in any manner he chooses. As to the claimed compulsion to subscribe to a private trade journal without official blessing or sponsorship, we see no illegality. All statute-directed publications of notice are made (so far as we can determine) in privately owned newspapers or journals. Indeed, as we have previously pointed out, section 24875 of the Act expressly calls for publication in a trade journal or industry price book of general circulation among wine licensees.

Respondents point out that prior to the 1961 amendment of section 24755, publication as now directed by rule 99(k) was then also directed by Department rule. Publication was not then expressly directed by the Act as it is now. They contend that by amending section 24755 the Legislature is presumed to have intended a change in the method of giving notice to retailer licensees.

By rules of the Department, and of its predecessor agency, the State Board of Equalization, minimum retail price schedules for branded distilled spirits have been published (except for a few years during and after World War II) since 1939[7] in a trade jour-

[7]Rule 42 (1939, 1940) and rule 22 (1941-1944), State Board of Equalization, rule 99, title IV, California Administrative Code (1947).

nal of general circulation. If the Legislature intended by its 1961 amendment of section 24755 that such publication be discontinued in favor of actual notice it seems likely that it would not have used the word "published." Instead it would have called for "written notice" or notice "personally or by mail" as it has elsewhere in the Act. (See for instance, §§ 23328, 23329, 23987, 25760.) The circumstances seem more likely to indicate an intent to confirm the practice of publication by placing express direction therefor in the Act.

While an intention to change the law is usually inferred from a material change in the language of the statute (Loew's Inc. v. Byram, 11 Cal.2d 746, 750; People v. Weitzel, 201 Cal. 116, 118) "the circumstances may indicate merely a legislative intent to clarify the law." (W. R. Grace & Co. v. Cal. Emp. Com., 24 Cal.2d 720, 729; see also San Joaquin Ginning Co. v. McColgan, 20 Cal.2d 254, 264; Martin v. California Mutual B. & L. Assn., 18 Cal.2d 478, 484; Union League Club v. Johnson, 18 Cal.2d 275, 279; County of Alameda v. Clifford, 187 Cal.App.2d 714, 723.)

We conclude that the Department's interpretation of the publication provisions of section 24755 is reasonable and certainly not "clearly erroneous." It should be followed by us. (See Cohon v. Department of Alcoholic Beverage Control, supra, 218 Cal.App.2d 332, 339.) Accordingly, the record before us discloses that the Department did sustain its burden of proving publication of minimum retail price schedules as required by section 24755.

Respondent licensees' second contention is stated as *"Section 24755 of the Business and Professions Code and Rule 99 are unconstitutional."*

The argument here is that section 24755 as amended, "is now nothing more than a naked 'price fixing' statute by which the Legislature has unlawfully delegated its power to producers and brand owners (who no longer are required to be in fair and open competition) and which permits them unilaterally to fix the price at which liquor must be retailed without any protective 'standards,' 'price guidelines,' 'ordinary play of competition' or 'bargaining processes' whatsoever." Such a grant of power, it is argued, is an unlawful delegation of legislative authority and is so arbitrary as to amount to a denial of due process of law as guaranteed by the federal and state Constitutions.

The appellate courts of this state apparently have never considered the constitutionality of section 24755 as amended in 1961. However, the general argument now made by respondent licensees has frequently been directed at distilled spirits minimum price statutes and regulations both in this state and elsewhere. While other states are not in agreement, the question in California appears to be resolved by the cases of Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control, 65 Cal.2d 349, and Allied Properties v. Department of Alcoholic Beverage Control, supra, 53 Cal.2d 141. These cases concerned the mandatory fair trade minimum price fixing provisions of the Act as they existed prior to the 1961 amendment of section 24755.

The earlier law permitted (and still permits) fair trade contracts relating to the sale of any branded distilled spirits, "which is in any fair and open competition with alcoholic beverages of the same general class produced by others. . . ." (Section 24750.) Section 24755 (before its 1961 amendment) provided that all "distilled spirits sold at retail shall be . . . sold pursuant to [such a fair trade] contract." As amended in 1961, section 24755 provides that no branded distilled spirits shall be sold at retail at a price below the filed effective minimum price schedule, without regard to whether there is a related fair trade contract.

It will be seen that since 1961 under section 24755 there is no longer a requirement that at least one fair trade contract be negotiated with a retailer, nor is there an express requirement that brands be in fair and open competition with other brands. These omissions, respondents urge, present new questions of constitutionality not decided by *Wilke & Holzheiser, Inc.*, supra, and *Allied Properties,* supra, which should now be considered by this court.

Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control, supra, 65 Cal.2d 349, 365-369, considering the pre-1961 mandatory minimum price fixing provisions of the Act, rejected the contention that they *unlawfully delegated* legislative power by enabling a producer or wholesaler to fix retail prices. It held that (pp. 365-366): "To argue that the Alcoholic Beverage Control Act unlawfully delegates legislative power because it is a 'price-fixing act' is to

overlook the crucial distinction between the fixing of a price for *all* products in a given market and the setting by the producer of the retail price at which *his own* product is to be sold." The court found no tendency in the Act to allow one to regulate the business of his competitors or to exclude potential competitors from the liquor industry. It concluded (p. 367): "To the extent that the retail price maintenance provisions enable a producer to control the bargaining process between those who sell and those who buy his own product, the Legislature could reasonably assume that competition among producers, coupled with the bargaining power of those low overhead retailers who desire lower retail prices, would provide a safeguard against excessive prices." The holding of Allied Properties v. Department of Alcoholic Beverage Control, supra, 53 Cal.2d 141, generally was to the same effect.

Respondents contend that the earlier statutory requisite of a negotiated fair trade contract was a necessary guideline and safeguard now wholly missing from the Act. We cannot agree that the former requirement that a producer establish a minimum price for his product by securing a fair trade contract with at least *one* retailer before it became binding on all retailers was in substance or practical effect any different from the present section 24755 requirement that he unilaterally fix such a price. In each case the producer effectively sets the price for which his own product is to be sold. The competition between producers and their respective brands is not affected.

This, coupled with the bargaining power of low overhead retailers who desire lower retail prices, could, as said by the *Wilke & Holzheiser* court, reasonably be assessed by the Legislature to be a safeguard against excessive prices.

Nor do we deem the absence from section 24755 of the specific requisite that the brands be in "fair and open competition with alcoholic beverages of the same general class produced by others" to create a constitutional infirmity. Such fair and open competition is a positive requirement of the Cartwright Antitrust Law (Bus. & Prof. Code, §§ 16700-16758). Minimum retail price schedules resulting from any combination for the purpose of stifling fair and open competition would be an offense against that law. (DeMartini v. Department of Alcoholic Beverage Control, supra, 215 Cal.App.2d 787, 808-809.)

Respondents complain that the Department is no longer required under section 24755 to produce affirmative evidentiary proof, or make express findings, that the brands involved are in such fair and open competition. This contention assumes that there was such a requirement prior to 1961. DeMartini v. Department of Alcoholic Beverage Control, supra, 215 Cal.App.2d 787, 808-809, considering the pre-1961 Act, held that certain statutory presumptions[8] constituted

[8]Code of Civil Procedure section 1963, subdivision 15, "that official duty has been regularly performed"; *idem*, subdivision 19, that "private transactions are fair and regular"; *idem*, subdivision 33, that "the law has been obeyed." (See Evid. Code, § 12.) They were repealed effective January 1, 1967, and reenacted in substance elsewhere.

evidence, in similar proceedings before the Department, that the filed price schedules were in fair and open competition. (See also Dave's Market, Inc. v. Department of Alcoholic Beverage Control, 222 Cal. App.2d 671, 677-678; United Liquors v. Department of Alcoholic Beverage Control, 218 Cal.App.2d 450, 453-454.) DeMartini v. Department of Alcoholic Beverage Control, supra (pp. 813-814), also held that express findings that the products were in fair and open competition were not required.

Applying the principles announced in Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control, supra, 65 Cal.2d 349, and Allied Properties v. Department of Alcoholic Beverage Control, supra, 53 Cal.2d 141, we hold section 24755 and rule 99 not to be violative of the due process clauses of the federal and state Constitutions.

Respondents Carella and Carella (1 Civ. 22994) and Carella and Maniscalco (1 Civ. 22995) further contend: *"The Department erred by considering four unproven prior accusations in determining the penalty imposed herein."*

Section 23095 provides, in part, as follows:

"Whenever a decision of the department suspending a license for 30 days or less becomes final, whether by failure of the licensee to appeal the decision or by exhaustion of all appeals and judicial review, the licensee may, before the operative date of such suspension, petition the department for permission to make an offer in compromise, . . ."

Four previous accusations concerning the named licensee respondents were found to be true by the Department. In each case it was decided that the license be suspended for 30 days or less. As to each decision, administrative or judicial review was pending when the parties stipulated to a penalty compromise (§ 23905) under which respondents would make a payment of $2,000. The compromise stipulation further provided that one case would be "permitted to become final" while the suspensions in the other "proceedings mentioned were merged." The $2,000 payment was made and the respective reviews or appeals were dismissed.

In the instant cases the Department found each of the four prior decisions was a final determination and considered all of them in fixing the penalties. Respondents contend that such findings were not supported by the evidence and that such consideration was error.

In administrative matters such as those before us, consideration of prior disciplinary proceedings is entirely proper, and the prior record of a licensee is relevant and material evidence of his knowledge of and compliance with the pertinent laws. (Dave's Market, Inc. v. Department of Alcoholic Beverage Control, supra, 222 Cal.App.2d 671, 679-680.)

We conclude that the evidence before the Department gave sufficient support to the questioned findings, and that the Department did not err in considering the four prior proceedings.

Certain respondent licensees have in their briefs urged several additional points which were not raised before the Department, the Appeals Board or the superior court. With the hereinafter discussed exception these points relate to questions of fact or mixed questions of fact and law which could have been presented to and considered by the Department. Under well-established rules such matters may not be urged for the first time on appeal. (See Ward v. Taggart, 51 Cal.2d 736, 742; Damiani v. Albert, 48 Cal.2d 15, 18; Algeri v. Tonini, 159 Cal.App.2d 828, 832.)

We think it proper, however, to consider one matter which is now urged for the first time by the following contention: *The penalties of revocation and suspension ordered by the Department should be vacated and a monetary penalty as provided by section 24755.1 should be applied retroactively.*

In 1965, and following the Department's hearings and decisions in the matters before us, the Legislature enacted section 24755.1. This section provides among other things that the license of a Department licensee shall not be suspended or revoked for a violation of section 24755. It establishes monetary penalties as the sanction for such violations.

Respondent licensees ask us to give retroactive application of section 24755.1 to their cases. We are precluded from doing so by Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control, supra, 65 Cal.2d 349, where a similar request was made. The court in *Wilke & Holzheiser, Inc.* (p. 373) held "Section 24755.1 clearly does not apply to a license sus-

pension or revocation preceding its effective date." However, in view of the current legislative intent concerning license revocation and suspension demonstrated by section 24755.1 the Department may elect to review respondent licensee's penalty assessments before they are placed in effect, as permitted by section 24211, added in 1963.

Each of the judgments appealed from is reversed. The superior court in each case will grant a writ of mandate commanding respondent Appeals Board to set aside its decision reversing the decision of the Department and to affirm such decision of the Department.

Elkington, J.

We concur:

Sims, J.

Christian, J.*

Filed November 21, 1967,
Lawrence R. Elkington, Clerk.

*Justice of the Court of Appeal of the State of California, First Appellate District, Division Four, sitting under assignment by the Chairman of the Judicial Council.

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OPINION ON DENIAL OF REHEARING

THE COURT:

We have considered the licensee-respondent's respective petitions for rehearing.

Respondents Carella (1 Civ. 22994) and Carella and Maniscalco (1 Civ. 22995) vigorously urge that this court failed to consider an important issue properly raised in their briefs. This issue is stated as "There was no proof of publication of the pertinent minimum price schedules *prior to their effective date.*" The

contention raises a theory relating to the *time* of publication as distinguished from the *fact* or *manner* of publication. We have again reviewed the record. The only pertinent statement of defense raised below alleged: "XI. That said minimum retail price schedules and the filings thereof were invalid and ineffective to establish the minimum resale prices of the distilled spirits subject of the Accusation and did not comply with § 24755 of the Business and Professions Code."

The contention now being discussed reasonably might have been considered as within the issues at the time of the Department hearing. However, the theory was not pointed out, argued or considered at the hearings before the Department, the Appeals Board or the superior court, and the Department was afforded no opportunity to meet it. It is urged for the first time on this appeal. "A party is not permitted to change his position and adopt a new and different theory on appeal." (Ernst v. Searle, 218 Cal. 233, 240-241; 3 Witkin, Cal. Procedure, p. 2264, § 96.) This rule is applicable to appeals such as those before us. (See Nelson v. Department of Alcoholic Beverage Control, 166 Cal.App.2d 783, 788.) Licensee-respondents Lancellotti (1 Civ. 23401) who presented the same point on their appeal concede that it was not urged below by them.

Rehearing denied.

Dated: Dec. 15, 1967.

Sims, Acting P. J.

Filed December 15, 1967,
Lawrence R. Elkington, Clerk.

Appendix B

Served on all parties by certified mail
May 20 1964

Before the Alcoholic Beverage Control Appeals Board
of the State of California

In the Matter of the Accusation
against
Charles Cohon and Irving Sirbu
dba: Alhambra Drug
2300 Polk Street
San Francisco, California
under the Alcoholic Beverage
Control Act.

AB-2089
File No. 19309; Reg. No. 18069
Time & Place of Hearing:
May 1, 1964, @ 10 a.m.
Ferry Building
San Francisco, California
For Department:
Honorable Stanley Mosk
Attorney General
L. Stephen Porter
Deputy Attorney General
For Appellants: M. M. Bourquin
Submitted on briefs.

Charles Cohon and Irving Sirbu, doing business as Alhambra Drug, have appealed a decision of the De-

27

rtment of Alcoholic Beverage Control determining em to have violated the provisions of section 24755 the Alcoholic Beverage Control Act and rule 99(f) title 4 of the California Administrative Code (sell- below fair trade) thereby establishing cause for cipline under section 24200(a) of the Alcoholic verage Control Act and article XX, section 22 of Constitution. A penalty of revocation of the ense was imposed.

The department alleged and found that on April 962, appellants sold, to an agent of the department, ase of alcoholic beverages, to wit, Gilbey's vodka, a price below the minimum resale price applicable said beverage.

Section 24755 of the Alcoholic Beverage Control Act vides in pertinent part as follows:

"(b) A price for each of such packages shall be in a minimum retail price schedule setting forth with respect to each package the exact brand, trademark or name, capacity, and type of package, type of distilled spirits, age and proof, where stated on the label, and the minimum selling price at retail . . . . Any person filing such schedule **shall** *cause such schedule to be published in a manner which will result in each retailer affected* by such schedule *being advised of the contents of such schedule* prior to the effective date thereof." (Emphasis added.)

question presented is whether or not the fore- g provision of section 24755 relative to the pub- ion of the price schedules has been complied with,

so far as the evidence in the record establishes in this case. In support of compliance with the statute, the department introduced into evidence the affidavit of Leroy W. Page, editor and publisher of "Beverage Industry News Price Book" to the effect that said publication is a trade journal of the liquor industry published at San Francisco and is in general circulation in the northern California trading area and, further, that said publication, has "been mailed to a majority of the off-sale retail licensees of the Department of Alcoholic Beverage Control and/or its predecessor in function authorized to sell Distilled spirits including beer and wine in the above-mentioned counties." This affidavit apparently is intended to establish compliance with department rule 99(k), which provides:

> "The person filing minimum retail price schedules shall cause prices for all items on every original price schedule and for every change of price or new price on every replacement price schedule to be published in a trade journal of general circulation in the trading areas affected on or before the effective date thereof. . . ."

It is obvious that the evidence in this record does not establish compliance with section 24755 relative to publication. That section requires that the publication be in a manner, "which will result in each retailer affected by such schedule being advised of the contents of such schedule prior to the effective date thereof." The affidavit of publication does not pur-

port to aver such a fact. Rather, it is limited in its scope to the averment that said publications, "have been mailed to a *majority* of the . . . licensees of the Department." (Emphasis added.) To the extent that rule 99(k) would purport to authorize such limited publication, said rule is in conflict with the requirements of section 24755 and so is, at least to that extent, invalid. (*Blatz Brewing Co. v. Collins,* 69 Cal. App.2d 639, 160 P.2d 37; *Tux Ginger Ale Co., Ltd. v. Davis,* 12 Cal.App.2d 73, 54 P.2d 1122; *American Distilling Co. v. State Bd. of Equalization,* 55 Cal.2d 799, 131 P.2d 609; *Blatz Brewing Co. v. Collins,* 88 Cal. App.2d 438, 199 P.2d 609; *Whitcomb Hotel v. Calif. Employment Commission,* 24 Cal.2d 753, 151 P.2d 233; *Harris v. Alcoholic Beverage Control Appeals Bd. & Payseno,* 204 Cal.App.2d 729, 22 Cal.Rptr. 634; 2 Cal. Jur.2d, Administrative Law, section 72.)

The evidence adduced by the department, in addition to failing to establish proper publication pursuant to the provisions of section 24755, failed to establish that appellants had actual notice of the schedule of minimum prices here involved. In this respect, this case is to be distinguished from other similar cases considered by us.

Failure to comply with the requirements for the publication of minimum price schedules renders ineffective the attempt to establish such a schedule of minimum prices, since the burden rests upon the department to prove all aspects of its case. (See appeal of Wilke & Holzheiser, AB-518.)

In view of the foregoing, the decision of the Department of Alcoholic Beverage Control in the present proceeding is hereby reversed.

Robert H. Haden, Chairman
Alcoholic Beverage Control
Appeals Board

We Concur:
Arthur W. Belcher
Leverette D. House
Sacramento, California
May 15, 1964

Served on all parties by certified mail
Dec 17 1964

Before the Alcoholic Beverage Control Appeals Board
of the State of California

In the Matter of the Accusation
against
Michael A. Carella and
Pasquale J. Maniscalco,
dba: Carella's Pharmacy
2049 Irving Street,
San Francisco, California,
under the Alcoholic Beverage
Control Act.

AB-2185
File No. 60850; Reg. No. 2423
Time & Place of Hearing:
November 6, 1964, @ 10 a.m.
World Trade Center
San Francisco, California
For Department:
Honorable Thomas C. Lynch
Attorney General
L. Stephen Porter
Deputy Attorney General
For Appellants: M. M. Bourquin, Esq.
No appearance at oral. (Submitted on written argument.)

The department alleged, and in its decision determined, that appellants violated the fair trade provisions of the Alcoholic Beverage Control Act in that

they sold certain alcoholic beverages at prices less than "the stipulated minimum price provided for in the Minimum Retail Price Schedule duly filed with the Department of Alcoholic Beverage Control." In addition to the question of the constitutionality of the statute and the argument that the system for price fixing provided violated federal anti-trust laws, appellants raised the issue that the price schedules were not published in accordance with the requirements of the statute, and the department's decision is therefore subject to reversal. It is this latter question with which we will here concern ourselves.

Appellants rely upon our recent decision in the appeal of Cohon and Sirbu, AB-2089, in their argument (see also AB-2181). In the Cohon and Sirbu case, the record failed to establish that the licensee had, in fact, received a copy of the industry publication (Beverage Industry News Price Book) in which had been published the price schedules for the beverages involved. (This is also true in the Carella case, AB-2181.) The record in this case establishes that a copy of this publication was mailed to these appellants.

On the issue of publication, LeRoy W. Page, editor and publisher of "Beverage Industry News Price Book," testified that said publication is a trade journal of the liquor industry published at San Francisco and is in general circulation in the northern California trading area. Those licensees subscribing to the publication are charged a subscription of $7.50 per year. Concerning the extent of subscription to the publication, Page testified as follows:

"Q. It is $7.50 a year. Do all of the off-sale retail licensees subscribe to that book?

"A. Well, I don't believe all of them do.

"Q. Do you know how many? What fractions do and what fractions do not?

"A. Not off-hand, no.

"Q. Do you mail it to all whether they subscribe or not?

"A. Yes.

"Q. What is the source of your statement there? What is your information on that?

"A. What?

"Q. You don't do it personally. What do you base that statement on that you mail it to all whether they subscribe or not?

"A. Oh, we get the list of license holders from a firm who makes it their business to sell lists of all types, and we know that they have all of the licensees listed, and we get it and make up our own list by areas and mail it to them.

"Q. What firm do you get that list from, please?

"A. That's the—let's see: what is the name? Business Extension Bureau.

"Q. That is a private enterprise?

"A. Yes.

"Q. What are they—people that prepare and sell lists?

"A. Yes.

"Q. To manufacturers or anyone that has a need for them? You don't get such a list from the State, do you?

"A. No.

"Q. Or the Department of Alcoholic Beverage Control?

"A. No, not direct.

"Q. Well, how do you get it indirectly?

"A. Through the Business Extension Bureau who have the persons on the job in Sacramento to get it——

"Q. So you understand.

"A. ——from this department. I have been there and checked it.

"Q. You have seen this private enterprise Business Extension Bureau and have seen a man in Sacramento checking the list?

"A. No, but I have been told by the department—there is one of, I believe, thirteen all together that get the list.

"Q. Uh huh. I see.

"A. And they say that through a new system they were working on it will be available to anyone who wants it and can pay whatever price it takes to compile.

"Q. Do you check that list furnished by that concern with the Department of Alcoholic Beverage Control?

"A. We are being audited right now by the Business——

"Q. Business Practices Unit?

"A. No, Business Publications Audit—it's an outfit that audits trade papers so the advertiser is assured that the statements we make are true, and he is going to Sacramento for that very reason because he won't take our word for it.

"Q. You haven't answered my question. That is going on now. But in November of '63 and before over the years have you made an attempt to check the list furnished by this private concern to ascertain whether they accurately report the off-sale retail licensees?

"A. If you mean going to Sacramento and checking our list against the one in Sacramento, the answer is no.

"Q. Or by exchange of correspondence?

"A. No. In a personal way, yes.

"Q. What?

"A. In discussing it with the ABC people in Sacramento on periodic visits.

"Q. Give us an example. Do you take the list and sit down and check it?

"A. No, no—I ask who is getting it now and how they obtain it and have been assured they have somebody on the job constantly getting these names.

"Q. Who is on the job?

"A. The Business Bureau Extension.

"Q. The private concern?

"A. Yes."

* * *

"Q. Mr. Page, does the State pay any of the expense or cost of publication of Beverage Industry News?

"A. No.

"Q. I mean by the State, I mean to include the Department of Alcoholic Beverage Control.

"A. No."

(R.T. 12:3-30; 13:1-30; 14:1-14; 14:21-26.)

The testimony of Mr. Page continues to the effect that while said publication goes to the great majority of licensees, about 75% of whom are subscribers, he could not testify that all licensees receive said publication. *Section 24755 (b) requires the filing of a minimum retail price schedule with the department and publication of said price schedule "in a manner*

which will result in each retailer affected by such schedule being advised of the contents of such schedule". (Emphasis added.) Subsection (e) of section 24755 provides:

> "No offsale licensee shall sell any package of distilled spirits at any price less than the effective filed price of such package unless written permission is granted by the department, for good cause shown and for reasons not inconsistent with this division."

It is our interpretation of these sections that in order for there to be an "effective filed price" for the beverage involved, the record must show compliance with the mandatory provisions of section 24755(b) as to filing with the department and publication in the manner prescribed. The offense is not that of selling below the minimum filed price, but rather, of selling, in the language of the statute itself, below the *"effective* filed price." (Emphasis added.) And to be "effective", the price must be not only filed but also published as required by law. If all that was required was the simple filing of the price schedule with the department, there would have been no need for the Legislature to *require* publication in the manner indicated and to also insert the adjective "effective" in subsection (e). Obviously the two provisions are related and must be read together. Such interpretation gives meaning to the express language employed by the Legislature.

Section 24755 is clear in its requirement that publication ". . . shall . . . be . . . in a manner which will

result in each retailer affected . . . being advised . . ." Since to be "effective" the schedule must be published in accordance with the provisions of this section, the record must contain substantial evidence of compliance therewith. In our opinion, the record in this case does not establish publication as required by the statute, and so the evidence does not support the department's finding that appellants sold at a price below the minimum retail price schedule duly filed.

In view of the foregoing, the decision of the Department of Alcoholic Beverage Control in the present proceeding is hereby reversed.

/s/ Robert H. Haden
Robert H. Haden, Chairman
Alcoholic Beverage Control
Appeals Board

We Concur:
Arthur W. Belcher
Leverette D. House
Sacramento, California
December 11, 1964

Served on all parties by certified mail
Dec 17 1964

Before the Alcoholic Beverage Control Appeals Board
of the State of California

In the Matter of the Accusation
against
Catherine and Michael Carella,
dba: Carella Liquors,
1907 Ocean Avenue,
San Francisco, California,
Respondents and Licensees,
under the Alcoholic Beverage
Control Act.

AB-2181
File No. 22786; Reg. No. 2422

Time & Place of Hearing:
November 6, 1964, @ 10 a.m.
World Trade Center
San Francisco, California

For Department:
Honorable Thomas C. Lynch
Attorney General
L. Stephen Porter
Deputy Attorney General

For Appellants: M. M. Bourquin, Esq.
No appearance at oral. (Submitted on written argument.)

This is a "fair trade" case involving a licensee who has been before this board on similar matters on many

occasions. The alleged violation in this case follows the same general pattern as presented in the other fair trade cases coming before us in which the constitutionality of the fair trade provisions of the Alcoholic Beverage Control Act has been attacked. That is to say, there is no dispute concerning the fact of the sale as set forth in the department's decision. It would add little to set forth that information here.

In addition to the issue of the validity of the statute and rules, appellants question compliance with the publication provisions of section 24755(b). In this assertion they rely upon our recent decision in the appeal of Cohon and Sirbu, AB-2089. The facts of this case on this issue are on all fours with the facts in AB-2089, and our decision in that case is determinative here.

The only evidence of publication consists of the affidavit of LeRoy W. Page, editor and publisher of "Beverage Industry News Price Book", to the effect that said publication is a trade journal of the liquor industry published at San Francisco and is in general circulation in the northern California trading area, and, further, that said publication has:

> ". . . been mailed to a majority of the off-sale retail licensees of the Department of Alcoholic Beverage Control and/or its predecessor in function authorized to sell Distilled spirits including beer and wine in the above-mentioned counties."

As stated by us in the Cohon and Sirbu case, such evidence fails to establish compliance with the publication provisions of section 24755 and requires rever-

sal of the department's decision. As we stated in this earlier decision:

"Section 24755 of the Alcoholic Beverage Control Act provides in pertinent part as follows:

> "'(b) A price for each of such packages shall be in a minimum retail price schedule setting forth with respect to each package the exact brand, trademark or name, capacity, and type of package, type of distilled spirits, age and proof, where stated on the label, and the minimum selling price at retail . . . . Any person filing such schedule **shall** *cause such schedule to be published in a manner which will result in each retailer affected* by such schedule *being advised of the contents of such schedule* prior to the effective date thereof.' (Emphasis added.)

"The question presented is whether or not the foregoing provision of section 24755 relative to the publication of the price schedules has been complied with, so far as the evidence in the record establishes in this case. In support of compliance with the statute, the department introduced into evidence the affidavit of Leroy W. Page, editor and publisher of 'Beverage Industry News Price Book' to the effect that said publication is a trade journal of the liquor industry published at San Francisco and is in general circulation in the northern California trading area and, further, that said publication, has 'been mailed to a majority of the off-sale retail licensees of the Department of Alcoholic Beverage Control and/or its predecessor in function authorized to sell Distilled spirits including beer and wine in the above-mentioned coun-

ties'. This affidavit apparently is intended to establish compliance with department rule 99(k), which provides:

> "'The person filing minimum retail price schedules shall cause prices for all items on every original price schedule and for every change of price or new price on every replacement price schedule to be published in a trade journal of general circulation in the trading areas affected on or before the effective date thereof. . . .'

"It is obvious that the evidence in this record does not establish compliance with section 24755 relative to publication. That section requires that the publication be in a manner, 'which will result in each retailer affected by such schedule being advised of the contents of such schedule prior to the effective date thereof.' The affidavit of publication does not purport to aver such a fact. Rather, it is limited in its scope to the averment that said publications, 'have been mailed to a *majority* of the . . . licensees of the Department.' (Emphasis added.) To the extent that rule 99(k) would purport to authorize such limited publication, said rule is in conflict with the requirements of section 24755 and so is, at least to that extent, invalid. (*Blatz Brewing Co. v. Collins,* 69 Cal.App.2d 639, 160 P.2d 37; *Tux Ginger Ale Co., Ltd. v. Davis,* 12 Cal.App.2d 73, 54 P.2d 1122; *American Distilling Co. v. State Bd. of Equalization,* 55 Cal.2d 799, 131 P.2d 609; *Blatz Brewing Co. v. Collins,* 88 Cal.App. 2d 438, 199 P.2d 609; *Whitcomb Hotel v. Calif. Employment Commission,* 24 Cal.2d 753, 151 P.2d 233; *Harris v. Alcoholic Beverage Control Appeals Bd. &*

Payseno, 204 Cal.App.2d 729, 22 Cal.Rptr. 634; 2 Cal. Jur.2d, Administrative Law, section 72.)

"The evidence adduced by the department, in addition to failing to establish proper publication pursuant to the provisions of section 24755, failed to establish that appellants had actual notice of the schedule of minimum prices here involved. In this respect, this case is to be distinguished from other similar cases considered by us.

"Failure to comply with the requirements for the publication of minimum price schedules renders ineffective the attempt to establish such a schedule of minimum prices, since the burden rests upon the department to prove all aspects of its case. (See appeal of Wilke & Holzheiser, AB-518.)"

In view of the foregoing, the decision of the Department of Alcoholic Beverage Control in the present proceeding is hereby reversed.

/s/ Robert H. Haden
Robert H. Haden, Chairman
Alcoholic Beverage Control
Appeals Board

We Concur:
Arthur W. Belcher
Leverette D. House
Sacramento, California
December 11, 1964

Served on all parties by certified mail
Jan 27 1965

Before the Alcoholic Beverage Control Appeals Board
of the State of California

In the Matter of the Accusation
against
Jack Dorian & Walter Matoff
dba: Acme Wine & Liquors
5210 Mission Street
San Francisco, California
Respondents and Licensees
under the Alcoholic Beverage
Control Act.

AB-2258
File No. 14662; Reg. No. 2890
Time & Place of Hearing:
December 4, 1964, @ 10 a.m.
World Trade Center
San Francisco, California
For Department:
Honorable Thomas Lynch
Attorney General
L. Stephen Porter
Deputy Attorney General
For Appellants:
M. Mitchell Bourquin, Esq.
(No appearance at oral
argument.)

This is another "fair trade" case involving the sale of alcoholic beverages in violation of section 24755 of

the Alcoholic Beverage Control Act and related rule 99(f), title IV, California Administrative Code.

The department in its decision found that appellants on January 3, 15, and 31, 1964 (three counts) did sell distilled spirits at a price less than the price provided for in the minimum retail price schedule filed with the department. The department imposed a penalty of suspension of the license privilege for 45 days on each count; said penalty is to run concurrently.

Appellants' appeal follows the same pattern that has been asserted in numerous fair trade cases coming before us and may be summarized as follows:

> The department has proceeded in excess of its jurisdiction because:
>
> I
>
> Sections 24752-24757 of the Alcoholic Beverage Control Act and rule 99 California Administrative Code are unconstitutional and invalid. (a) Unlawful delegation of legislative power and authority. Legislature failed to establish standards of control.
>
> (b) Public deprived of the protection of fair and open competition in violation of the California Constitution, Sherman Anti-Trust Act, and the Cartwright Act.
>
> (c) Fair trade provisions nullify purpose and policy of this state as to sale of alcoholic beverages within this state.
>
> (d) Fair trade provisions nullify state policy in that the fair trade provisions and rules permit

excessive consumption of alcoholic beverages and intemperance by the "validating" of resale retail prices for distilled spirits under "private brands."

(e) Fair trade provisions promote . . . agreement . . . and conspiracy between manufacturers and brand owners to divide the market to exclude competition and to maintain monopoly control.

(f) That the price schedules sought to be enforced were not published as required by law.

II

That the department has proceeded without and in excess of its jurisdiction and has not proceeded in the manner required by law in the following particulars:

(1) In taking official notice and giving any consideration to any earlier accusations which were settled and compromised before and without any final substantiation or determination of the charges involved.

(2) Price fixing authorized by section 24755 constitutes a restraint of trade and commerce among the several states in violation of the Sherman Anti-Trust Act.

(3) Minimum prices sought to be enforced were fixed by agreement in violation of the Sherman Anti-Trust Act for the purpose of limiting and suppressing competition and to deny the consumer the benefit of protection of the same.

III

The department's decision is not supported by the findings and the findings are not supported by the evidence.

IV

That the fair trade provisions of the Alcoholic Beverage Control Act and the related rules violate article XX, section 22 of the California Constitution, the due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States, and article I, section 13 of the California Constitution.

V

That the minimum schedules were accepted by the department without any information or investigation of cost—production—manufacturing of the distilled spirits subject thereof or the reasonableness thereof to the consumer in violation of the Sherman Act, the Cartwright Act, and the Alcoholic Beverage Control Act of the State of California.

The department's decision contains the following:

"FINDINGS OF FACT:

"COUNT I

"It is true that on January 3, 1964 that the above named licensees at the above designated licensed premises did sell distilled spirits at retail to Special Investigator J. Derenzo of the Department of Alcoholic Beverage Control at a price less than the stipulated minimum price provided for in the Minimum Retail Price Schedule duly filed with the Department of Alcoholic Beverage Control, as follows;

"Item	Lawful Minimum Retail Price	Price Paid	Difference
Three (3) 4/5 qts. Ancient Age Straight Bourbon Whiskey, 86 proof	$ 4.99 ea. $14.97	$ 3.50 ea. $10.50	$1.49 ea. $4.47
4% Sales Tax	.60	–0–	.60
Total	$15.57	$10.50	$5.07

"COUNT II

"It is true that on January 15, 1964, the above named licensees at the above designated licensed premises did sell distilled spirits at retail to Special Investigator J. Derenzo of the Department of Alcoholic Beverage Control at a price less than the stipulated minimum price provided for in the Minimum Retail Price Schedule duly filed with the Department of Alcoholic Beverage Control, as follows:

"Item	Lawful Minimum Retail Price	Price Paid	Difference
Two (2) 4/5 qts. Ancient Age Straight Bourbon Whiskey, 86 proof	$ 4.99 ea. $ 9.98	$ 3.50 ea. $ 7.00	$1.49 ea. $2.98
One (1) 4/5 qt. Gilbey's Gin, 90 proof	4.19	3.25	.94
	$14.17	$10.25	$3.92
4% Sales Tax	.57	–0–	.57
Total	$14.74	$10.25	$4.49

"COUNT III

"It is true that on January 31, 1964, the above named licensees at the above designated licensed premises did sell distilled spirits at retail to Special Investigator J. Robinson of the Department of Alcoholic Beverage Control at a price less than

the stipulated minimum price provided for in the Minimum Retail Price Schedule duly filed with the Department of Alcoholic Beverage Control, as follows:

"Item	Lawful Minimum Retail Price	Price Paid	Difference
Two (2) 4/5 qts. Ancient Age Straight Bourbon Whiskey, 86 proof	$ 4.99 ea. $ 9.98	$ 3.50 ea. $ 7.00	$1.49 ea. $2.98
One (1) 4/5 qt. Calvert Gin, 90 proof	3.99	3.25	.74
	$13.97	$10.25	$3.72
4% Sales Tax	.56	-0-	.56
Total	$14.53	$10.25	$4.28

"FINDINGS OF FACT ON AFFIRMATIVE DEFENSE:

"It is not true that the minimum retail prices alleged in the Accusation were fixed by or pursuant to any agreement, combination or conspiracy between the manufacturers or brand owners of the distilled spirits subject of the Accusation and other distilled spirits.

"LICENSEES' PREVIOUS RECORD:

"Licensed at the above location since 1959. Accusation filed 7/10/61 for viol. Sec. 24755, Rule 99 (f) (Fair Trade), Reg. 16014; Order of Revocation now before Superior Court; Accusation filed 11/27/61 for violation of Fair Trade, Reg. 16991. Order of Revocation now before Supr. Court. Also licensed at 717 El Camino Real, Redwood City, 4/26/60 to 5/23/63. Accusation filed for violation of Fair Trade, Reg. 16013; 30 days,

15 stayed on condition of transfer; all stayed when license transferred.

"DETERMINATION OF ISSUES PRESENTED:

"The Accusation states facts sufficient to constitute a cause of action for violation of the Alcoholic Beverage Control Act and the Rules and Regulations of the Administrative Code.

"Neither Section 24755 of the Business and Professions Code nor Rule 99, Title 4, of the California Administrative Code is unconstitutional or invalid for any of the reasons set forth in paragraph III of the respondents' 'Notice of Defense' on file herein, reference to which is hereby made, or otherwise.

"Neither Section 24755 of the Business and Professions Code nor Rule 99 of Title 4 of the California Administrative Code violate Article XX, Section 22, of the Constitution of the State of California, nor the due-process clauses of the Fifth or Fourteenth Amendments to the Constitution of the United States, nor Article I, Section 13, of the Constitution of the State of California.

"Neither Section 24755 of the Business and Professions Code nor Rule 99, of Title 4, of the California Administrative Code authorize or constitute a restraint of trade or commerce in violation of the Sherman Anti-Trust Act, nor Article XX, Section 22, of the Constitution of the State of California, nor the Cartwright Act.

"The said minimum price schedules and the filings thereof were valid and effective to establish the minimum resale prices of the distilled

spirits at the time of sale thereof, and complied with Section 24755 of the Business and Professions Code.

"By reason of the foregoing facts found to be true, grounds for the suspension or revocation of such license exist and the continuance of such license would be contrary to public welfare and morals, as set forth in Article XX, Section 22, State Constitution, and Section 24200 (a), Business and Professions Code. Additional grounds for suspension or revocation under Section 24200 (b), Business and Professions Code, exist in that respondents have violated Business and Professions Code, Section 24755 and Title IV, California Administrative Code, Rule 99 (f), as found under each of Counts I, II, and III."

The department in its determination of issues presented responds to the special defense asserted by appellants subsequent to receipt of the department's accusation. A special defense was directed to the purported invalidity of the fair trade provisions of the Alcoholic Beverage Control Act.

There is no need to here discuss evidence supportive of the sales set forth in the department's decision. There is no dispute as to these transactions. We do, however, feel constrained to mention that here the sales in question were so openly made (at the purported "illegal" prices) that the licensees may be considered as being only one step removed from openly advertising the sale of alcoholic beverages at prices below the minimum price schedule.

In the instant matter there is one question which causes us concern. Appellants in their appeal contend: "That the price schedules sought to be enforced were not published as required by law."

Section 24755 (b) of the Alcoholic Beverage Control Act requires the filing of a minimum retail price schedule with the department and publication of said price schedule ". . . in a manner which will result in each retailer affected by such schedule being advised of the contents of such schedule . . ." Subsection (e) of section 24755 provides:

> "No offsale licensee shall sell any package of distilled spirits at any price *less than the effective filed price* of such package unless written permission is granted by the department, for good cause shown and for reasons not inconsistent with this division." (Emphasis added.)

It is our interpretation of these sections that in order for there to be an "effective filed price" for the beverage involved, the record must show compliance with the mandatory provisions of section 24755 (b) as to filing with the department and publication in the manner prescribed. The offense is not that of selling below the minimum filed price, but rather of selling, in the language of the statute itself, below the "effective filed price." And to be "effective," the price must be not only filed but also published as required by law.

At the time of the department hearing, it was stipulated:

"Mr. Lampe: He testified——

"Mr. Bourquin: ——on April the 17, in a proceeding against the licensee Carella, register number 2423. And he testified fully; both sides examined him. And so I would be happy to stipulate with you, if he were called today he would testify to the same effect.

"The Hearing Officer: And we can incorporate his testimony by reference, is that right?

"Mr. Bourquin: Yes.

"Mr. Lampe: That would be satisfactory . . ." (R.T. 9:4-13.)

In the hearing in the matter of the accusation against Michael A. Carella and Pasquale J. Maniscalco, doing business as Carella's Pharmacy, AB-2185, File No. 60850; Reg. No. 2423, Mr. Page's testimony starts on page 3 and ends on page 16. With respect to the question of publication, Mr. Page's pertinent testimony appears to be the following:

"Q. Mr. Page, how long have you been publishing the Beverage Industry News?

"A. Since 1935.

"Q. And what area does this Beverage Industry News publication cover?

"A. Well, there are two. There is a newspaper which covers all of the State of California, and there is a separate price book which covers the Northern California trading area.

"Q. That is known as the Coast Division?

"A. Yes, Coast and Valley.

"Q. And how often is this published?

"A. On the first of each month.

"Q. To whom is this publication distributed?

"A. To the alcoholic beverage licensees in the State.

"Q. Is that on record with the Department?

"A. Yes.

"Q. And are records kept to whom the publications are sent?

"A. Yes, sir.

"Q. You have access to those records?

"A. Yes."

* * *

"Q. Now, then, the book—you said the book in this case—you said copy of this book was mailed to the Licensee here in November, the Price Book for November,——

"A. Yes.

"Q. ——1963? Is it mailed to Licensees? Was is mailed to all retail off-sale licensees then in November of 1963?

"A. Well, I couldn't swear to it, but it should have been. It was mailed in the same manner each time and I see no reason why it shouldn't have."

* * *

"Q. What do you charge the licensee to furnish him monthly with a copy of the Beverage Industry News?

"A. Now it is $7.50 a year.

"Q. It is $7.50 a year. Do all of the off-sale retail licensees subscribe to that book?

"A. Well, I don't believe all of them do.

"Q. Do you know how many? What fractions do and what fractions do not?

"A. Not off-hand; no.

"Q. Do you mail it to all whether they subscribe or not?

"A. Yes.

"Q. What is the source of your statement there? What is your information on that?

"A. What?

"Q. You don't do it personally. What do you base that statement on that you mail it to all whether they subscribe or not?

"A. Oh, we get the list of license holders from a firm who makes it their business to sell lists of all types, and we know that they have all of the licensees listed, and we get it and make up our own list by areas and mail it to them.

"Q. What firm do you get that list from, please?

"A. That's the—let's see: what is the name? Business Extension Bureau.

"Q. That is a private enterprise?

"A. Yes."

* * *

"Mr. Bourquin: Well, I think it has—the witness has made the statement that they mailed all of the retailers that he gets a list from this private concern—they mail to all. Those who subscribe pay seven and a half a month, and those who don't don't pay anything.

"Mr. Lampe: Well, it isn't an issue in the case.

"Mr. Bourquin: It shows the influence where the publication was taken and it shows how wholly independent it is of any official character.

"The Hearing Officer: Well, it is a possibility that those who don't pay don't get it."

(R.T. 3:24-30; 4:1-13; 11:18-26; 11:30; 12:1-25; 15:9-19.)

In our opinion, it would have been far better to have had direct testimony on the issue of publication.

Under the stipulation, we have Mr. Page testifying that the publication is distributed "to the alcoholic beverage licensees in the State." (AB-2185; R.T. 4:7); that he did not believe that all of the off-sale retail licensees subscribe to the publication (R.T. 12:5); that they mailed the publication to all of the licensees whether they subscribe or not (R.T. 12:10); that possibly 25 per cent of the licensees are non-subscribers; that 25 per cent of the licensees may be delinquent at one time, but that 100 per cent of the licensees at one time or another have paid (R.T. 16); and that they get the list of licensed holders from a firm who makes it their business to sell lists of all types (R.T. 12:17). In answer to a question as to whether the price book was mailed to all retail off-sale licensees in November, 1963, Mr. Page replied:

> "Well, I couldn't swear to it, but it should have been. It was mailed in the same manner each time and I see no reason why it shouldn't have." (R.T. 11:24-26.)

Section 24755 of the Alcoholic Beverage Control Act is clear in its requirement that publication ". . . shall . . . be . . . in a manner which will result in each retailer affected . . . being advised . . ." Since to be "effective" the schedule must be published in accordance with the provisions of this section, the record must contain substantial evidence in compliance therewith. In our opinion, the record in this case does not establish publication as required by the statute and so the evidence does not support the department's finding

that appellants sold at a price below the minimum retail price schedule duly filed.

In view of the foregoing, the decision of the department in the present proceeding must be reversed.

/s/ Robert H. Haden
Robert H. Haden, Chairman
Alcoholic Beverage Control
Appeals Board

We Concur:
Arthur W. Belcher
Leverette D. House
Sacramento, California
January 19, 1965

Served on all parties by certified mail
Aug 24 1965

Before the Alcoholic Beverage Control Appeals Board
of the State of California

In the Matter of the Accusation
against
Charles Cohon and Irving Sirbu,
dba Alhambra Drug Store,
2300 Polk Street,
San Francisco, California,
Respondents and Licensees,
under the Alcoholic Beverage
Control Act.

AB-2324
File No. 19309; Reg. No. 2729
Time & Place of Hearing:
July 8, 1965, @ 10 a.m.
World Trade Center
San Francisco, California
For Department:
Honorable Thomas Lynch
Attorney General
L. Stephen Porter
Deputy Attorney General
For Appellants:
M. Mitchell Bourquin, Esq.
(No appearance at oral
argument.)

Appellants operate a drug store and in connection therewith exercise the privilege of selling alcoholic

beverages "off sale" under the auspices of the off-sale general license issued to them by the Department of Alcoholic Beverage Control. The present proceeding was commenced against them by the filing of an accusation by the department on January 22, 1964, accusing appellants of having violated the minimum price provisions of the Alcoholic Beverage Control Act and related rules of the department. In due course a hearing was held on this accusation and a decision was adopted by the department determining, in two counts, that appellants, in fact, had sold certain alcoholic beverages "at prices less than the stipulated minimum prices provided for in Minimum Retail Price Schedules duly filed with the Department of Alcoholic Beverage Control." It was appellants' contention before the department, and it is their contention on appeal, that the minimum price provisions of the Alcoholic Beverage Control Act are unconstitutional and invalid, as are the department rules adopted pursuant thereto, and that the evidence is insufficient to support the findings in that there is no substantial evidence that the price schedules were not published in accordance with the requirements of the statute. Because of the insufficiency of the evidence to support the findings, it is unnecessary to consider the constitutional question. We shall, therefore, address ourselves to the question of the sufficiency of the evidence in relation to publication of the price schedules.

We have, in several recent decisions (AB-2089, Appeal of Cohon and Sirbu; AB-2181, Appeal of Carella; AB-2185, Appeal of Carella and Maniscalco; and AB-2258, Appeal of Dorian and Matoff, held that the man-

date of section 24755 requires the filing of a minimum retail price schedule with the department and publication of said price schedule "in a manner which will result in each retailer affected by such schedule being advised of the contents of such schedule." It is our interpretation of these sections that in order for there to be an "effective filed price" for the beverage involved, the record must show compliance with the mandatory provisions of section 24755(b) as to the filing with the department and publication in the manner prescribed. The offense is not that of selling below the minimum filed price, but, rather, of selling, in the language of the statute itself, below the "*effective* filed price" (emphasis added) and to be effective, the price must not only be filed but also published as required by law. If all that was required was the simple filing of the price schedule with the department, there would have been no need for the Legislature to require publication in the manner indicated and to also insert the adjective "effective" in subsection (e) of section 24755.

The evidence of publication in this case consists of the testimony of the publisher of "Beverage Industry News," Leroy W. Page. He testified:

> "Q. Now, to whom was this publication distributed?
>
> "A. To all the distilled spirits licensees in the Northern California Trading Area."
>
> (R.T. 2:16-18.)

On cross examination into the method of mailing, Mr. Page testified as follows:

"Q. Now, you also stated that when they subscribed originally, do you receive notifications from these licensees requesting a subscription?

"A. In some cases.

"Q. And the others, how do you ordinarily obtain the licensees that are in California, the alcoholic beverage licensees?

"A. Well, the new ones we get from Sacramento.

"Q. Over a period of years do you recall how you receive this notification? Was this sent from the Department each time a person was licensed to you?

"A. Yes, we buy that list, actually, from a mailing firm whose business it is to have that list up to date; and it would cost us more money to try and get it individually than through him since he's not only getting it for us, he's getting his list up that he sells to many other people. So we can do it cheaper through him than we could by going to Sacramento personally and getting it.

"Q. You rely on that list?

"A. Yes, for the new ones.

"Q. Pardon?

"A. For the new ones.

"Q. But unless there's any changes——

"A. Yes."

* * *

"Q. Mr. Page, who is that mailing firm that you say you buy the list of licensees from?

"A. I can't think of the name of it. The name escapes me. They have been in business for a long, long time but we don't do business with them constantly. It's just when they get these they send them to the office.

"Q. You mean they drop you a note each new licensee?

"A. Yes, they send it on a regular form that they have.

"Q. Of each new one even if it just be one?

"A. Each new one and each change.

"Q. This is a private concern?

"A. Yes.

"Q. And you say you rely on that one for the new ones and——

"A. Yes.

"Q And you mean the new ones, those over how many few years?

"A. Well, whenever a person gets a license as a new license or if it's purchased from somebody else and the name changes.

"Q. In other words, you rely on them to keep your list up to date?

"A. Yes.

"Q. Now, how long have you been doing business with that private mailing firm?

"A. Oh, a number of years.

"Q. How many would you say?

"A. Oh, possibly ten.

"Q. What did you do before that, what was your source of the licensees?

"A. Well, we were doing business with another one, but it's the same idea exactly."

(R.T. 19:7-29; 21:9-30; 22:1-6.)

Section 24755 is clear in its requirement that publication "shall . . . be . . . in a manner which will result in each retailer affected." Since to be "effective" the schedule must be published in accordance with the provisions of this section, the record must contain substantial evidence of compliance thereto. To the extent that rule 99(k) of the department is inconsistent

with Business and Professions Code section 24755, in our opinion the record in this case does not establish publication as required by the statute. The testimony of Mr. Page is that a list is obtained from a private company, said list purporting to contain the names of licensees of the Department of Alcoholic Beverage Control. This list is provided to a mailing service which prepares address-o-graph plates and mails a copy of the "Beverage Industry News" to each name appearing on this list. It is obvious that Mr. Page has no personal knowledge that the names on the list are actual licensees of the department or that the list is complete. His testimony cannot be considered as substantial evidence in support of the finding that the price schedules here involved were published in accordance with the provisions of the statute.

In view of the foregoing, the decision of the Department of Alcoholic Beverage Control in the present proceeding is hereby reversed.

Leverette D. House, Chairman
Alcoholic Beverage Control
Appeals Board

We Concur:
Leon M. Cooper
Roger P. Garety
Sacramento, California
August 19, 1965

Appendix C

California Business and Professions Code

§ 24755. Minimum retail price schedule; filing; amendments; loss leader sales; rejection of noncomplying schedules; exempt sales. (a) No package of distilled spirits which bears the brand, trademark or name of the owner or person in control shall be sold at retail in this State for consumption off the license premises unless a minimum retail price for such package first shall have been filed with the department in accordance with the provisions of this section.

(b) A price for each of such packages shall be in a minimum retail price schedule setting forth with respect to each package the exact brand, trademark or name, capacity, and type of package, type of distilled spirits, age and proof, where stated on the label, and the minimum selling price at retail. The price for any such package may be filed separately and differently for the trading area of Southern California and the trading area of Northern California. The trading area of Southern California shall consist of the Counties of Santa Barbara, Ventura, Los Angeles, Orange, Riverside, San Bernardino, Imperial and San Diego. The Northern California trading area shall consist of the other counties of the State. No more than one person shall file a schedule for the same package for the same trading area. Any person filing such schedule shall cause such schedule to be published in a manner which will result in each retailer

affected by such schedule being advised of the contents of such schedule prior to the effective date thereof.

(c) Such schedule shall be filed by (1) the owner of the brand, if licensed in the State; (2) any licensee, other than a retailer, selling the brand and who is authorized in writing by the brand owner to file such schedule if the brand owner is not licensed in this State; (3) a manufacturer or rectifier licensed in this State and who bottles under the brand owned by a retailer; or (4) any licensee with the approval of the department, if the owner of the brand does not file or is unable to file a schedule or authorize a licensee other than a retailer to file such schedule.

(d) Schedules filed pursuant to this section may be amended, changed, or modified by filing such amendments, change, or modification with the department on or before the 15th day of any month to take effect on the first day of the second succeeding calendar month; except that prices filed for a brand, size, or type not included in a schedule in effect at the time such brand, size, or type is filed, and prices filed to meet the price of a competitive brand, may be filed on or before the 15th day of any month to take effect on the first day of the following month. For the purpose of this section, a competitive brand shall mean any brand of the same type of distilled spirits having a filed selling price at retail within one dollar ($1) per gallon of the brand for which a competitive price is filed.

No retailer shall sell any package of distilled spirits as a loss leader. "Loss leader," as used in this section,

means a sale below cost as such cost is defined in Sections 17026 to 17029, inclusive, of this code, except that a sale below cost made under the provisions of Section 17050 of this code shall not be deemed a loss leader sale.

The department shall reject any price schedule which does not comply with this subdivision.

(e) No offsale licensee shall sell any package of distilled spirits at any price less than the effective filed price of such package unless written permission is granted by the department, for good cause shown and for reasons not inconsistent with this division.

(f) The provisions of this section shall not apply to:

(1) A closeout sale made in good faith and approved by the department when the following conditions exist: (i) the stock of distilled spirits sought to be closed out has been in this State, either in the possession of the vendor who sold it to the retailer or in the possession of the retailer who seeks to close out the brand, for a period of not less than six months; (ii) the stock of distilled spirits to be closed out was not brought into this State for the purpose of offering it, or any part of it, at a closeout sale; (iii) at least 10 days prior to filing a request with the department for approval to sell the stock at a closeout sale, the retailer had offered to return the distilled spirits, at his original invoice cost, to both the vendors from whom he purchased them or to his successor and to the licensee who filed the minimum price schedule

under the provisions of this section; (iv) such offer of return was not accepted.

At the place of any closeout sale and upon any package of distilled spirits to be so sold and in any advertisement in connection therewith, public notice shall be given of the sale as a closeout sale. Following the conclusion of a closeout sale, the retailer who conducted such sale shall not sell the same brands of distilled spirits for a period of at least one year.

(2) Sales made with the approval of the department when the distilled spirits or the package is damaged or deteriorated in quality and notice of this fact is given to the public at the place of any such sale and upon the package offered for sale and in any advertisement in connection therewith.

(3) Sales made by any officer acting under the orders of any court.

(g) A minimum retail price schedule containing a minimum retail price for each package of any brand of beer may be filed under the provisions of this chapter by the person in control of such brand and when so filed, the provisions of this chapter and any rules adopted by the department for the administration of the provisions of this chapter shall apply to the sale of packages of such brand of beer. (Added Stats. 1961, c. 635, p. 1835, § 4.)

Appendix D

99. Minimum Retail Price Schedules. (a) **Posting of Minimum Retail Price Required.** No off-sale licensee shall sell any package of distilled spirits at a price less than the effective minimum retail price of such package filed with the department, unless written permission is granted by the department for good cause shown and for reasons not inconsistent with the law.

The licensed owner or person in control of a brand, trade mark or name appearing on a package of distilled spirits which is to be sold for consumption off the licensed premises in California must file a "Distilled Spirits Minimum Retail Price Schedule" containing the minimum bottle and case prices to consumers for every distilled spirits item carrying that brand, trade mark or name.

(b) **Brand Defined.** The word "brand" as used herein means "brand, trade mark, label or name", and if an additional secondary name or a different form of label is used, each will be considered to be a separate brand.

(c) **Distilled Spirits Item Defined.** "Distilled spirits item" as used herein means a distilled spirits package that differs from all other distilled spirits in addition to its brand, as defined in (b) above, in any one of the following categories: (1) Type of distilled spirits including type of bottling (in bond or not in bond), and type of blend (blend of straight whiskeys or spirits blend); (2) Percentage of Straight

Whiskey; (3) Age, if shown on the label; (4) Proof; (5) Origin (domestic or imported); (6) Bottle size; and (7) Number of bottles in a case.

When a container other than the normal container for a brand is used as in the case of a decanter, higher minimum retail prices must be established to reflect any additional cost involved.

(d) **Distilled Spirits Sold "On-Sale" Only.** If a particular item is labeled to indicate that it is intended for sale to and for dispensing by on-sale retailers only (such as "bar package", "for on-sale only"), the minimum retail price thereof need not be filed. However, if any sale for off-sale consumption of such item should be made, the licensee making such sale will have violated the law.

(e) **Who Files Minimum Retail Price Schedules.**

Only one licensee is permitted to file a "minimum retail price schedule" containing the price for the same item for the same trading area. However, different prices may be filed in the Northern and Southern trading areas.

This means that (1) the owner of the brand or the corporate subsidiary who exclusively markets the products thereof and so is the controller of the brand, if licensed in California, if other than a retailer, must file; or (2) if the owner of the brand is not licensed in California and has no corporate subsidiary marketing in California, any licensee, other than a retailer, authorized by him in writing must file, such as a wholesaler or importer authorized by an out-of-State

or out-of-country brand owner; or (3) if the brand is owned by a retailer, the California-licensed manufacturer or rectifier who bottles an item of distilled spirits under that brand must file for the item; or (4) if none of the three situations above apply and the brand is owned by a retailer, the importing wholesaler must file. If none of the three situations above apply and the brand is not owned by a retailer, then any licensee, other than a retailer, who secures the approval of the department must file.

(f) **Price Schedule Sheets to be Filed.** Four copies of a "Distilled Spirits Minimum Retail Price Schedule" on a form prescribed by the department must be filed with the department, 1215 O Street, P.O. Box 1139, Sacramento 5, and one copy retained by the licensee in his office for inspection. The "Minimum Retail Price Schedule" may be printed, typewritten or otherwise duplicated on 16 or 20 pound paper on a format and size prescribed by the department and must show the form number "ABC 705" in the lower left-hand corner of the face of the sheet. All information called for on the form sheet must be supplied. A separate set of "Price Schedules" must be made originally, or if added later as a new item, for every different type of distilled spirits, and if that type has different categories as defined in (2), (3), (4) and (5) in the definition of "Distilled Spirits Item" in (c) above, a separate set must be made for each such difference. Each schedule must contain every bottle size (6) and every size of case (7) in which that brand, type, etc., will be sold. When a new bottle size

or new size case is to be sold, or the price of any size of bottle or size of case already on file is to be changed either independently or to meet the price of a competitive brand, new sets of price schedules, in quadruplicate, must be filed to replace those on file and must also include all the information that was on the superseded schedule. Both minimum retail bottle price and minimum retail case prices covering all case sizes must be shown on the price schedules for each size and type.

(g) **Filing Dates; New Item.** A set of original schedules for new items must be filed on or before the close of business of the fifteenth day of any calendar month to take effect on the first day of the following month, provided, however, the price of such new item is published on or before the aforesaid effective date.

(h). **Change of Minimum Retail Price on File.** A set of replacement schedules must be filed on or before the close of business of the fifteenth day of any calendar month, to be effective on the first day of the second succeeding month; provided, however, the changed price is published on or before the aforesaid effective date.

(i) **Change in Price of an Item to Meet Price of Competitive Brand.** A set of replacement schedules for competitive items must be filed on or before the close of business of the fifteenth day of any calendar month, to be effective on the first day of the following month; provided, however, such price change is published on or before the aforesaid effective date.

A competitive brand is a brand of the same type of distilled spirits as the brand for which a change in price is being filed and for which at the time of filing there is on file a "Price Schedule" sheet filed by some other licensee showing a minimum retail price for the competitive brand item within one dollar per gallon of the price being charged, and proportionately for smaller sizes. The same type of distilled spirits means one identical as to categories (1) and (5) in the definition of "Distilled Spirits Item" in (c) above; the price change involved must apply to the identical item indicated in categories (6) and (7).

If a price is filed to meet the price of a competitive brand, the price so filed shall be the same as the price which is being met.

(j) **Filing Date Exception.** Whenever the fifteenth day of any month falls on Saturday, Sunday or a legal holiday, the price schedules required to be filed may be filed not later than the close of business the next business day.

(k) **Publication.** The person filing minimum retail price schedules shall cause prices for all items on every original price schedule and of every change of price or new price on every replacement price schedule to be published in a trade journal of general circulation in the trading areas affected on or before the effective date thereof. Publication of minimum retail prices for a brand sold only to a single retailer may be accomplished by the mailing of such price schedules by the importer, manufacturer, manufacturer's agent, rectifier or wholesaler, and any amend-

ments thereto, to the retail licensee affected thereby. The schedule shall be deposited in the United States Post Office on or before the date or dates required for publication of price schedules as prescribed above in this paragraph, and the mailing shall be complete at the time of such deposit. A record of each such notification should be retained in the file of the posting licensee for three years.

(l) **Deliveries.** No manufacturer, wholesaler or rectifier shall make deliveries of any particular item of distilled spirits to any off-sale retail licensee before a "Price Schedule" with that item thereon has been filed with the department; thereafter he may make deliveries thereof within such time before the price becomes effective as would give the retailer reasonable time to get the item ready for sale upon the price becoming effective.

(m) **Withdrawal of Item from Price Schedule.** No item may be deleted from a replacement "Price Schedule" once it has been filed on an original schedule until the department authorizes such deletion when the department makes a finding that the item is carried in wholesale and off-sale retail inventories in only very small quantities.

(n) **Transfer of Price Filing Obligation.** When, for any reason, price filing responsibility for any item is transferred from one licensee to another, the price schedules of the licensee then on file will continue in effect until replaced by an effective new filing by the successor which will be considered to be a schedule already on file.

(o) **Tax Increase or Government Order.** Pursuant to an order issued by the department, any price schedule may be changed at any time to reflect changes in federal or state excise taxes on distilled spirits or to comply with the requirements of any order issued by the federal government and relating to price control.

(p) **Sales as Loss Leaders Prohibited.** All distilled spirits minimum retail prices filed under the provisions of Section 24755 shall comply with all the provisions of said section including the provisions of subsection (d) which prohibits the sale of distilled spirits as a loss leader. Any licensee filing distilled spirits minimum retail prices below the purchasing retailer's cost of acquisition plus said retailer's cost of doing business as referred to in said subsection shall produce evidence to show that such price was filed to meet the legal price of a competitor selling the same article or product.

NOTE: Authority cited for amendment filed 10-2-56: Sections 24757 and 25750, Business and Professions Code; Section 22, Article XX, California Constitution. Issuing agency: Department of Alcoholic Beverage Control. Additional authority cited: Sections 24749, 24750, 24751, 24752, 24755 and 25752, Business and Professions Code.

History: 1. Repealer and new section filed 9-12-61; designated effective 10-15-61 (Register 61, No. 18). For prior history, see Register 60, No. 16.